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No. 91-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RWM ENTERPRISES, INC. and
MOORE AUTOMOTIVE GROUP, INC.,
Petitioners,

vs.

ES DEVELOPMENT, INC. and
EDWIN G. SAPOT,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents ES Development, Inc. and Edwin G. Sapot respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Petitioners' "statement of the case" and characterization of the "facts" as found by the District Court, are misleading in numerous respects. Petitioners' statements that their activity found to violate the antitrust laws was "admittedly legal and proper" and

was engaged in "with a legitimate purpose and through legitimate means" (Br. at 4) indicates how Petitioners have chosen to present this Court with a version of the facts rejected by both the District Court and the Court of Appeals.

The actual facts of this case, as found by the District Court, appear at pages 27-33 of the Appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners and the seven other automobile dealers sued by Respondents formed the Dealer Alliance and "agreed to undertake action to frustrate the plans of their prospective competitor." App. at 12. Far from being "legal and proper" or "legitimate", the Dealer Alliance engaged in a series of concerted activities designed to ensure that no automobile manufacturer committed to place a dealership in the Mall. The Petitioners knew that without such commitments, the Mall would not be built and a competitive threat to their own dealerships would not occur. The District Court found, and the Court of Appeals agreed, that the Petitioners "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, ..." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

Petitioners contend that they did nothing more than exercise rights granted under their franchise agreements. Br. at 6. While perhaps free to do so acting alone, "[t]he evidence here, however, compels the inference that the dealers chose to exercise their individual legal rights in a concerted manner designed to impair [Respondents'] ability to procure franchise commitments from various manufacturers." App. at 13. The District Court rightly found that the "motivating factor" in the Petitioners and their co-conspirators' parallel protests was to eliminate the Mall as a competitive threat. App. 37. It is difficult to imagine a more clear cut and direct concerted antitrust conspiracy.

Petitioners also contend that none of the acts undertaken to oppose the Mall was in itself illegal. Br. at 5. In a leap of logic unsupported in antitrust law, Petitioners conclude that their activities were immune from antitrust liability since they did not "achieve an unlawful objective." Br. at 5. Through concerted activity, Petitioners sought to restrain competition—the very essence of "unlawful" activity under Section 1 of the Sherman Act.

In finding their conduct violative of the antitrust laws, the District Court and the Court of Appeals applied settled antitrust principles to the clear combination in which Petitioners engaged. These principles establish that "[a]cts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade." *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 (7th Cir. 1977), *cert. denied*, 439 U.S. 1090 (1979); *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962); *Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948) ("[e]ven an otherwise lawful device may be used as a weapon in restraint of trade . . . .") Both the District Court and the Court of Appeals found that no automobile dealer, acting alone, could have achieved the anticompetitive result that the Petitioners, in concert with their co-conspirators, intended to achieve and did in fact achieve. App. at 15, 36-37. The Petitioners' activities were found to have been "conceived in a purpose to unreasonably restrain trade." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. at 469.

Petitioners also contend that they could not have run afoul of the antitrust laws because they were simply exercising their First Amendment right to commercial speech. As the Court of Appeals noted, "the exercise of such rights as an integral part of an illegal conspiracy will not shield the conspirators from antitrust liability." App. at 15; *see, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972).

Petitioners' First Amendment argument would emasculate the antitrust laws. For example, if Petitioners' argument were adopted, no one would be found liable for price fixing, because the essential communication fixing prices would be protected speech under the First Amendment. This Court has previously rejected Petitioners' reliance on the First Amendment as a shield against antitrust liability. "It is well settled that First Amend-

ment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transp. Co.*, 404 U.S. at 514.

CONCLUSION

Petitioners' conduct represented a classic combination or conspiracy in restraint of trade. The District Court and the Court of Appeals relied on settled antitrust principles in imposing liability on Petitioners. Respondents respectfully pray that the Court deny the Petition.

Respectfully submitted,

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